

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE BERRY,
Plaintiff - Appellee,

v.

FLEMING COMPANIES, INC., aka
Fleming Foods, Inc., aka Fleming; DOE
INDIVIDUALS 1-50; DOE
PARTNERSHIP 1-20; DOE
CORPORATION 1-20; DOE ENTITIES
1-20,

Defendants,

and

POST CONFIRMATION TRUST,
Defendant - Appellant.

WAYNE BERRY,
Plaintiff - Appellant,

v.

FLEMING COMPANIES, INC., aka,
Fleming Foods, Inc., aka Fleming; DOE
INDIVIDUALS 1-50, DOE
PARTNERSHIPS 1-20; DOE
CORPORATIONS 1-20; DOE
ENTITIES 1-20; POST
CONFIRMATION TRUST

No. 05-15223
D.C. No. CV-01-00446-SPK

No. 05-15347
D.C. No. CV-01-00446-SPK/LEK

**OPPOSITION TO WAYNE
BERRY'S MOTION FOR
INJUNCTION PENDING APPEAL;
DECLARATION OF DAMIAN
CAPOZZOLA; EXHIBITS "A"
THROUGH "D"; CERTIFICATE OF
SERVICE**

Wayne Berry's request for an injunction pending appeal is frivolous. Berry sued Fleming back in 2001, seeking tens of millions of dollars in compensation for copyright infringement claims. In Judge King's courtroom in Hawai'i, Berry lost

EXHIBIT "E"

almost everything, getting just \$98,250 from a jury. After the jury verdict but before the judgment, Fleming filed for bankruptcy protection in Delaware. Berry's case was automatically stayed. Soon after, Berry sued a number of third parties in Hawai'i (in Judge Mollway's court), alleging that a conspiracy of them (and Fleming) continued to infringe his copyrights after the bankruptcy filing. Berry moved for a TRO in his new case. He lost.

During its reorganization, Fleming sold its Hawai'i division to C&S and shut down its operations.¹ Berry promptly added Fleming and C&S to his new, postpetition case in front of Judge Mollway in Hawai'i and moved for another injunction against them. He lost again. (Ex. A) (10/8/04 preliminary injunction order).

Turning back to the prepetition case before Judge King, Berry successfully asked the Bankruptcy Court to lift the stay to permit him to take his jury verdict to judgment. During post-trial motions, Berry sought yet another injunction from Judge King. He lost again. (Ex. B). In denying Berry's motion, Judge King rightly noted that the same parties (Berry, the Fleming PCT, and C&S) were currently litigating with one another in the postpetition case before Judge Mollway, and deferred to Judge Mollway's lengthy, well-reasoned order denying Berry's

¹ One part of Fleming's business, the convenience division, continued to operate. That entity, called Core-Mark, had nothing to do with Berry or his software, and is not a party to any litigation brought by Berry.

injunction request against Fleming and C&S (Ex. A). Both sides appealed the judgment from Judge King's courtroom to this Court. That appeal is pending.

After this appeal was filed, Berry then took the unusual step of moving for his **fourth** injunction request, this time asking Judge King for an injunction pending appeal. Judge King denied it. (Ex. C). This motion followed.

Here, Fleming no longer exists. As part of its reorganization, Fleming's wholesale division shut down entirely. Instead, a post-confirmation trust (the "PCT") holds a number of rights and obligations relating to Fleming. The PCT conducts no operations, ships no freight, and has no use whatsoever for any of Berry's freight control software. Issuing an injunction against the PCT is, as Judge King pointed out, entirely pointless.

Berry seeks to avoid the pointlessness of his current request by claiming that the PCT is somehow "facilitating" C&S's infringement through an indemnity. But Berry has already tried and failed to get injunctive relief against C&S **directly** in his pending litigation before Judge Mollway. Had there been something that needed protection, Judge Mollway would have protected it. In fact, Judge Mollway ruled that the current software that C&S is using does **not** infringe any of Mr. Berry's rights.

Berry lost each of his **four** prior attempts in two courts (twice before Judge King in the prepetition case and twice before Judge Mollway in the postpetition

action) to get an injunction, Berry now makes his fifth request to this Court. Of course, his appeal from Judge King's denial of his injunction request is already pending here, so one could fairly say that this motion is his sixth request.

The legitimate purpose of an injunction pending appeal "is preservation of the status quo until the court of appeals has acted on an appeal from an order granting or denying an injunction." Pacific Coast Medical Enterprises v. Harris, 633 F.2d 123, 136-7 (9th Cir. 1980). Berry's motion does just the opposite: it seeks to disturb the status quo and attempt to gain an advantage in the lawsuit presently pending before Judge Mollway.

Berry's motion is frivolous. This Court should deny it.

A. Fleming Does Not Even Exist Any Longer, And Cannot Be Infringing Berry's Copyrights.

As part of the bankruptcy proceedings in Delaware, Fleming sold numerous assets, including its Hawai'i operations, to C&S, and then either shut down or liquidated its entire wholesale division.² Pursuant to the reorganization plan, the PCT was formed to wind up Fleming's affairs. The PCT holds various of Fleming's rights and obligations, among them the defense of Mr. Berry's claims. The PCT runs no operations, ships no freight, and has no use for Berry's software.

² A different portion of the company, called Core-Mark, successfully reorganized. But Core-Mark was in no way involved with the Hawai'i operations that worked with Berry and used to use his software.

It isn't selling anything to anyone, and so is at no risk of selling Mr. Berry's software to anyone. Nor is the PCT running any computers on which Berry's software exists. Simply put, the PCT presents zero risk of infringing Mr. Berry's software.

To avoid this argument, Berry trots out his usual accusations that Fleming's indemnity to C&S somehow facilitates ongoing infringement, and seeks injunctive relief on that basis.³ In reality, the indemnity is entirely proper and commonplace. After Fleming agreed to sell the Hawai'i operations but before that sale closed, Berry sued C&S in Hawai'i, alleging his usual copyright claims. Given that Berry had a long and tortured history with Fleming and that C&S was a stranger to the relationship, C&S asked for and received an indemnity from Fleming with respect to Berry's claims. At Fleming's plan confirmation, Berry claimed, as he does here, that the indemnity was illegal and otherwise improper. Despite Berry's objections, and after thorough discussion, the Delaware bankruptcy court found nothing untoward about the indemnity. (Ex. D at 224-225) (confirmation hearing

³ During his lengthy history of litigating against Fleming, Berry has made numerous inflammatory (and entirely frivolous) allegations against Fleming. He has accused Fleming of overcharging Hawai'i consumers, price-fixing, cigarette smuggling, criminal infringement, RICO, calling witnesses in the prior trial who consort with those who decapitate missionaries, and of breaking in to his home. In his current postpetition litigation, he is asserting damage claims approaching a quarter of a billion dollars based on purported infringement of software that he licensed to Fleming **for free**.

transcript).

Moreover, Berry already tried, and failed, to get an injunction against C&S, the alleged direct infringer whose efforts the PCT is supposedly facilitating. If Judge Mollway did not think that C&S's (allegedly direct) infringement was worth enjoining, neither should this Court enjoin the PCT's "facilitation" of that infringement.

B. Fleming Did Not Sell Any Of Berry's Software To C&S.

Berry claims that Fleming sold his software to C&S. Not so. Berry raised this claim at length at Fleming's plan confirmation in the bankruptcy court in Delaware. He alleged there, as here, that Fleming "sold" Berry's software to C&S because some copies of it remained on the computer systems that Fleming sold to C&S.

In reality, neither Fleming nor C&S even knew that copies of Mr. Berry's software remained on Fleming's computers. Fleming never intended to sell Mr. Berry's software to C&S, and C&S never intended to buy it. The parties' asset purchase agreement did not schedule it; nor did C&S pay Fleming a dime for it. In those circumstances, no "sale" took place for purposes of the copyright laws. See Ex. D, at 158-159, 173-174 (confirmation hearing transcript).

C. The Johnson Report Is Not Properly Before This Court.

Berry repeatedly argues that the report of his expert-for-hire, Philip Johnson,

somehow justifies an injunction. That report is not properly in the record before this Court. In fact, that report is dated only a couple of months ago, long after the jury returned a verdict and long after Judge King issued his post-trial order denying Berry's injunction request in this case. None of that should be any surprise, as the Johnson report is a report created for purposes of Berry's postpetition litigation, which has not yet gone to trial. Berry did attach a copy of it to his post-trial motion before Judge King (who presided over the prepetition litigation), but the admissibility of the Johnson report has never been passed on by any district court. There is no reason for this Court to consider it now for the first time -- particularly where, as here, Fleming has not yet deposed Professor Johnson on his report and Fleming's expert report is not yet due.

Berry now asks this Court to ignore Judge Mollway's extensive, thoughtful ruling denying his injunction motion because, he says, she did not have the Johnson report. That's because Berry didn't bother to submit it to Judge Mollway. If he thinks it controls the issue, then his remedy is to file another motion in Judge Mollway's court and include an expert report this time.

D. Conclusion.

Wayne Berry has tried every argument he could think of in every forum he could think of to get leverage to settle his claims against Fleming and C&S. He tried to get a TRO before Judge Mollway, and lost. He tried to block Fleming's

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KIRKLAND & ELLIS

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confirmation plan, and lost that too. He sought a preliminary injunction against Fleming and C&S in the pending litigation here in Hawai'i, and lost again. He then asked Judge King for an injunction during post-trial motions on his prepetition case. He lost again. Not to be denied, he asked Judge King for an injunction pending appeal, but Judge King denied that, too. He's back again, but his inflated rhetoric and wild accusations never have established and never will establish the merits of his claims. This Court should deny his frivolous motion, and should sanction him for bringing it.

DATED: April 13, 2005

Respectfully submitted,
KIRKLAND & ELLIS LLP

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii
citizen,

Plaintiff,

vs.

HAWAIIAN EXPRESS SERVICE,
INC., a California
corporation; H.E.S.
TRANSPORTATION SERVICES,
INC., a California
corporation; CALIFORNIA
PACIFIC CONSOLIDATORS,
INC., a California
corporation; JEFFREY P.
GRAHAM and PETER SCHAUL,
California citizens; MARK
DILLON and TERESA NOA,
BRIAN CHRISTENSEN, Hawaii
citizens; FLEMING
COMPANIES, INC., an
Oklahoma corporation;
C & S LOGISTICS OF HAWAII,
LLC, a Delaware LLC;
C & S WHOLESALE GROCERS,
INC., a Vermont
corporation; C & S
ACQUISITIONS, LLC;
FOODLAND SUPER MARKET,
LIMITED, a Hawaii
corporation; HAWAII
TRANSFER COMPANY, LIMITED,
a Hawaii corporation, DOE
INDIVIDUALS 1-350; DOE
PARTNERSHIPS, CORPORATIONS
and OTHER DOE ENTITIES
1-20,

Defendants.

CIVIL NO. CV03 00385
SOM-LEK

(Copyright)

DEPOSITION OF
MARK DILLON

DATE TAKEN: 12-16-03

VOLUME 1
Pages 1 - 171

COPY

EXHIBIT "F"

1 A The one I have now, about a year.

2 Q Okay. And prior to that, did you have
3 another computer at home?

4 A Yes.

5 Q What computer was that?

6 A Another PC clone.

7 Q Have you ever had copies of what was
8 known as the Berry Freight Control System on your
9 PC clone at home?

10 A I think I had a copy of it when I was
11 working at A.P.I.

12 Q And when you say A.P.I., you're referring
13 to Atlantic Pacific International, Inc.; is that
14 correct?

15 A Yes, I am.

16 Q Now, have you told Guidance Software -- I
17 believe his name is Michael Gurzi, G-u-r-z-z-i
18 (sic), I believe. Have you told him you had
19 previously had copies of Mr. Berry's software on
20 your home computer when he came here to perform his
21 work in July of this year?

22 A I don't think I did. I think he said
23 that his scope of work did not include my home
24 computer based on his conversation with the
25 discovery master.

A Yes.

Q Do you understand why none of these files that are in the report contain your directories? Do you have any understanding of why that is?

A Yeah, because we keep all our users's files on the server so that I can back them up easily. They change constantly. I don't want my coworkers to lose their work. Now I back up my own machine separately, and so I do not need to keep all my files on the server.

Q How often do you back up your machine?

A I don't know. It varies. It's become a low priority. But let me think about that for a minute. I have now included my critical files, my personal files, or files that I use every week in our daily backup. So, currently, that's how I'm handling that problem.

Q How often -- you back up daily is what you're saying? Is that like after hours, you run a backup?

A Toward the end of the day.

Q What happens to that backup program?

A I keep it. I retain it.

Q Where do you retain it?

A In my car.

C E R T I F I C A T E

STATE OF HAWAII)
)
) ss.

I, LAURA SAVO, a Notary Public in and for
the State of Hawaii, do hereby certify:

That prior to being examined, the witness
herein, MARK DILLON, was sworn by me to testify to
the truth, the whole truth and nothing but the
truth;

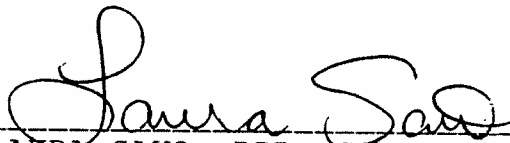
That the foregoing deposition was taken
down by me in machine shorthand at the time and
place herein stated, and was thereafter reduced to
typewriting under my supervision;

That the foregoing is a full, true
and correct transcript of said deposition;

That after said deposition was reduced to
typewriting, the witness, in accordance with Rule
30(e) of the Hawaii Rules of Civil Procedure, was
duly informed of the right to make such corrections
as might be necessary to render the same true and
correct.

I further certify that I am not of
counsel or attorney for any of the parties to this
case, nor in any way interested in the outcome
hereof, and that I am not related to any of the
parties hereto.

Witness my hand and seal this 21st day of
December, 2003.


LAURA SAVO, RPR, CSR NO. 347
Notary Public, State of Hawaii
My Commission Expires: 11/28/2005

MDB_After

Name	File Ext	Description	Last Accessed
Accounting LOGISTICS SCREENS.MDB	MDB	File, Deleted, Archive	4/11/2003
Accounting Reformat.mdb	mdb	File, Archive	7/6/2003
Auxiliary Logistics Data.mdb	mdb	File, Archive	7/6/2003
Auxiliary Logistics Screens - Converted.mdb	mdb	File, Archive	7/6/2003
db1.mdb	mdb	File, Deleted, Archive	4/11/2003
db2.mdb	mdb	File, Archive	7/6/2003
db2.mdb	mdb	File, Archive	7/6/2003
Evidence.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
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FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS EDI PO.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data Original.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
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FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FCS Logistics Data.mdb	mdb	File, Archive	7/6/2003
FHL Data Screens.mdb	mdb	File, Deleted, Archive	4/11/2003
ORDERS.MDB	MDB	File, Deleted, Archive	4/11/2003
*ORIGINAL LOGISTICS SCREENS.MDB	MDB	File, Deleted, Archive	7/11/1997
POLInItems.mdb	mdb	File, Archive	4/11/2003
POLInItems.mdb	mdb	File, Archive	7/6/2003
Queries.mdb	mdb	File, Archive	7/6/2003
Queries.mdb	mdb	File, Archive	7/6/2003
Rack Labels.mdb	mdb	File, Archive	7/6/2003

EXHIBIT "G"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;)	Civ. No. CV03 00385 SOM-LEK
)	(Copyright)
Plaintiff,)	
)	DECLARATION OF WAYNE
vs.)	BERRY EXHIBITS "A" THROUGH
)	"E"
HAWAIIAN EXPRESS SERVICE,)	
INC., a California corporation; et al.)	
)	
Defendants.)	
_____)	

DECLARATION OF WAYNE BERRY

I, WAYNE BERRY, am the plaintiff in this case and I make this declaration under the penalty of perjury. All the statements herein are true and correct to the best of my knowledge, information and belief. If called upon to testify regarding the matters herein, I am competent and willing to do so.

1. In 1993, I began work on my Freight Control System as an original work of authorship which was fixed as a tangible medium of expression in 1993.

2. On or about October 1999, I complied with the statutory formalities for registering the copyright to the Freight Control System software ("FCS") and received from the Registrar of Copyrights copyright registration Number TX5-079-445.

3. I have not assigned or sold my copyright to Freight Control System and remain the legal and beneficial owner of the copyrighted software and have standing to bring this action. None of the Defendants in this case possess any valid license to my work that would authorize continued use of my work.

4. My FCS is a vertical market application. C&S Wholesale Grocers, Inc. is a potential customer of mine for the use of this software.

5. The continued possession of an unlicensed copy of my work by C&S, its employees or anyone not under the control of the court exposes my work to unlicensed uses over which I have no control.

6. Until all unlicensed copies have been returned to me and all infringers enjoined, I face an imminent risk of irreparable harm.

7. I wrote my software to create cost savings that I believed would be passed on to the Hawaii civilian and military consumers that should be the ultimate beneficiaries of this system.

8. Attached hereto as Exhibit "A" is a true and correct excerpt of a Food and Drug Administration Enforcement Report dated January 12, 2005. The excerpt is the first 3 pages of the twenty-seven page report from the FDA website page, found at: <http://www.fda.gov/bbs/topics/enforce/2005/ENF00882.html>

9. On page three of Exhibit "A", "Fleming Companies, Inc." is identified as the "distributor of the "Best Yet" peas that are being recalled.

10. Attached hereto as Exhibit "B" is a true and correct copy of a grocery store receipt I obtained on October 15, 2005 when I purchase the products shown in Exhibit "C" and Exhibit "D".

11. Attached hereto as Exhibit "C" is a true and correct copy of a "Best Yet" carton of milk that I purchased from Foodland as shown by the receipt in Exhibit "B". The carton labeling shows "Fleming Companies, Inc." as the "Distributor" of the milk.

12. Attached hereto as Exhibit "D" is a true and correct copy of a "Best Yet" box of cereal that I purchased, as shown by the receipt in Exhibit "B". The box labeling shows "Fleming Companies, Inc." as the "Distributor" of the cereal.

13. Attached hereto as Exhibit "E" is a true and correct copy the first two of six pages of results from a search I made at the United States Patent and Trademark Office's "Trademark Electronic Search System" ("TESS") for "Best Yet" Trademark Registration number 2746075 on October 15, 2005. "TESS" is available to the public over the Internet at:

<http://tess2.uspto.gov/bin/gate.exe?f=search&state=kjogtm.1.1>

14. Page two of Exhibit "E" shows the "Last Applicant(s) / Owner(s) of Record" of Trademark Registration number 2746075 to be "Fleming Companies, Inc.

Dated, Honolulu, Hawaii 10/24/2005

Wayne Berry
WAYNE BERRY

Exhibit A

FDA Enforcement Report for
January 12, 2005

Page 3 of 27

“BEST YET brand GREEN PEAS
DISTRIBUTED BY FLEMING
COMPANIES, INC.”

Enforcement Report for January 12, 2005



[FDA Home Page](#) | [Search FDA Site](#) | [FDA A-Z Index](#) | [Contact FDA](#)

Enforcement Report

The FDA Enforcement Report is published weekly by the Food and Drug Administration, Department of Health and Human Services. It contains information on actions taken in connection with agency Regulatory activities.

January 12, 2005
05-02

RECALLS AND FIELD CORRECTIONS: FOODS - CLASS I

PRODUCT

Fort Fudge Shop brand Vanilla Nut Fudge sold in 6 ounce packages. Recall # F-123-5.

CODE

All purchases made between August 2003 and June 2, 2004.

RECALLING FIRM/MANUFACTURER

Fort Fudge Shop, Mackinaw City, MI, by press release issued June 4, 2004 and telephone on June 8, 2004. Firm initiated recall is complete.

REASON

The product was manufactured using almonds recalled by Paramount Farms due to their association with an outbreak of Salmonella Enteritidis infection.

VOLUME OF PRODUCT IN COMMERCE

50 pounds.

DISTRIBUTION

MI.

PRODUCT

Organica Double Chocolate Coffee Toffee Cookies, 6.5 oz packages. Recall # F-124-5.

CODE

Lot numbers 20705, 31905, 32005, 42905, 60205. Printed on bottom of cartons on a sticker.

RECALLING FIRM/MANUFACTURER

Bloomfield Bakers, Los Alamitos, CA, by letter and press release on November 24, 2004, Firm initiated recall is ongoing.

REASON

The product contained undeclared walnuts.

VOLUME OF PRODUCT IN COMMERCE

25,476.

DISTRIBUTION

Nationwide.

PRODUCT

a) Great Value brand White Sandwich Bread, 24 oz.

Recall # F-125-5;

b) Great Value brand White Round Top Bread, 16 oz.

Recall # F-126-5;

c) Great Value brand Split Top White Bread, 24 oz.

Enforcement Report for January 12, 2005

Recall # F-127-5.

CODE

- a) Sell by Dates of September 20th through October 4th and Code numbers 22264 to 22278.
- b) Sell by dates of September 20th thru October 4th and the Code Numbers 22264 to 22278;
- c) Sell by Dates of September 20th through October 4th and code numbers 22264 to 22278.

RECALLING FIRM/MANUFACTURER

Interstate Brands Corp, Pomona, CA, by telephone, email and press release issued on October 7, 2004. Firm initiated recall is complete.

REASON

Product contains undeclared allergen, whey.

VOLUME OF PRODUCT IN COMMERCE

5,798.

DISTRIBUTION

CA.

RECALLS AND FIELD CORRECTIONS: FOODS - CLASS II

PRODUCT

Mushroom Soy Sauce, 5 pound plastic jugs. Recall # F-121-5.

CODE

Expiration date of 22 05 2006.

RECALLING FIRM/MANUFACTURER

Cf Group, Yorba Linda, CA, by letters on or about December 14, 2004. Firm initiated recall is ongoing.

REASON

Product contains undeclared sulfites.

VOLUME OF PRODUCT IN COMMERCE

468 jugs.

DISTRIBUTION

OK, AR, MO, KS, TX.

PRODUCT

Father Sam's Spinach Wraps, 6 count package. Net Wt 13 oz. Sold in plastic bags. Keep refrigerated or frozen after opening. Firm on the label: "BAKED ESPECIALLY FOR YOU BY: FATHER SAM'S BAKERY". Sold in trays/12 packages per tray, and also sold to one consignee frozen, 18 packages per case. Recall # F-122-5.

CODE

Pull dates 11/10/2004 thru 11/21/2004, and lot # 090204. Codes varied depending on the consignee shipped to.

RECALLING FIRM/MANUFACTURER

Commitment 2000, Inc., Buffalo, NY, by letters dated September 8, 2004. Firm initiated recall is complete.

REASON

Product contains undeclared colors, FD&C Yellow #5 and FD&C Blue #1.

VOLUME OF PRODUCT IN COMMERCE

4,347 units (6/10" wraps).

DISTRIBUTION

NY and PA.

PRODUCT

- a) Orange fruit juice drinks packaged in 1 gallon plastic bottles labeled in part:

****JONLLY***Light***NutraSweet***CHINA*****

1Gal**** Recall # F-130-5;

- b) Fruit Punch packaged n 1 gallon plastic bottles labeled in part: ***JONLLY**Light**NutraSweet**

FRUIT PUNCH****1 Gal***** Recall # F-131-5.

CODE

Enforcement Report for January 12, 2005

a) China(orange) light: Nov 6/04 and Nov 7/04;

b) Fruit light - Nov 8/04.

RECALLING FIRM/MANUFACTURER

JONLLY FRUITS, INC., Bayamon, PR, by visit beginning on August 27, 2004. Firm initiated recall is ongoing.

REASON

a) The product contains undeclared color, FD&C Yellow # 5;

b) The product contains undeclared color, FD&C Yellow # 6.

VOLUME OF PRODUCT IN COMMERCE

225 gallons.

DISTRIBUTION

PR.

PRODUCT

a) Frozen peas in various brands and package sizes

(day code 176): BEST YET brand GREEN PEAS

DISTRIBUTED BY FLEMING COMPANIES, INC. in 32 oz.

plastic bags, 12/case;

FLAV R PAC GRADE A FANCY GREEN PEAS, DISTRIBUTED BY

NORPAC FOODS, INC., in 40 oz. plastic bags and 20 lb.

poly lined boxes;

WESTPAC FROZEN GREEN PEAS DISTRIBUTED BY NORPAC FOODS

INC., in 20 lb. poly lined boxes;

VALLEY MAID GREEN PEAS DISTRIBUTED BY NORPAC FOODS

INC in 20 lb. poly lined boxes;

Roche Bros. Fancy Sweet Peas Distributed by Roche

Bros., Inc., Wellesley, MA in 16 oz. plastic bag,

12/case; unlabeled bulk totes, 1700 lbs. Day code 174:

FOOD LION Green Peas, DISTRIBUTED BY FOOD LION, LLC

in 10 oz. plastic bags, 24.case. Recall # F-133-5.

b) Frozen peas & carrots, Pathmark brand, 40 oz.

plastic bags. Recall # F-134-5.

CODE

a) Product packed from day code 176 includes:

Best Yet coded 31974A, 31974B;

Roche Bros. coded 52184C, 52184D, 52184E;

Flav-R-Pac, 40 oz. coded TJ4-18A3, TJ4-18B3,

TJ4-C3, TJ4-D3, TK4-15B, TK4-15C, TK4-15D,

TK4-22 D3, TL4-05A3, TL4-05B3, TL4-05C3,

TL4-05D3, TL4-16A3, TL4-16B3, TL4-19A3,

TL4-19B3, TL4-19C3, TL4-19D3, TL4-30C3,

TL4-30D3,

FLAV-R-PAC 20 lb coded TJ4-28A3;

WestPac coded TJ4-28A3, TJ4-28B3, TJ4-28C3,

TJ4-28D3;

Valley Maid coded TL4-09A3 Product packed

from day code 174: Food Lion coded 52244A;

b) 52244A (packed from day code 174).

RECALLING FIRM/MANUFACTURER

Twin City Foods Inc, Stanwood, WA, by letters on September 26, 2004. Firm initiated recall is complete.

REASON

Products are contaminated with Staphylococcus aureus.

VOLUME OF PRODUCT IN COMMERCE

12,343 cs, plus 5100 lbs. bulk totes.

DISTRIBUTION

Nationwide.

RECALLS AND FIELD CORRECTIONS: FOODS - CLASS III

PRODUCT

Exhibit B

Foodland Receipt



Store Director - Jon Kashiwabara

FOODLAND HAWAII KAI #15
7192 Kalanianaʻole Hwy.
Honolulu, HI 96825
(808) 395-3131

REG 2 10/15/05 Trx# 387143 Time 13:23
ST 15 Cashier 106 Ann

1 -BY HOMOGENIZED MILK	2.69	TFM
1 BY HONEY OATS/FLAKES	4.55	TF

2 Items	Subtotal	7.24
	Tax	.30
	Total	7.54

*** Cash *** 8.00-

Cash Change .46

You Saved with your Maika'i Card .80
(Maika'i items indicated with 'M')

Maika'i No.F42216241725
Give Aloha at Foodland & Sack N Save
Together, We Can Build a Better Hawaii

Exhibit C

“Best Yet” Milk
Distributed by Fleming
Companies, Inc.



Nutrition Facts

Serving Size 1 cup (240mL)
Servings Per Container 8

Amount Per Serving

Calories 150

Calories from Fat 80

% Daily Value*

Total Fat 8g **12%**

Saturated Fat 5g **25%**

Trans Fat 0g

Cholesterol 35mg **12%**

Sodium 115mg **5%**

Total Carbohydrate 11g **4%**

Dietary Fiber 0g **0%**

Sugars 11g

Protein 8g **16%**

Vitamin A 6% • Vitamin C 4% • Calcium 30%

Iron 0% • Vitamin D 25%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

Calories per gram:

Fat 9

Carbohydrate 4

Protein 4

INGREDIENTS: Milk, Vitamin D₃.

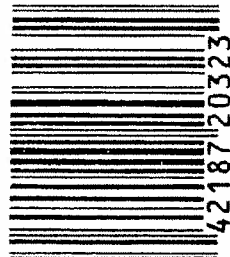
DISTRIBUTED BY
FLEMING COMPANIES, INC.
OKLAHOMA CITY, OK 73126 USA
©FLEMING COMPANIES, INC. 2000

KEEP REFRIGERATED

QUESTIONS OR COMMENTS
1-888-MY-BEST-1 (1-888-692-3781)
WEEKDAYS 8-5 (CENTRAL TIME)



PROCESSED AND
PACKAGED AT
PLANT CODED
ON SEALER STRIP



DO NOT OPEN
2006

SELL BY

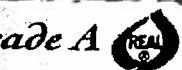
TO OPEN ▶



PUSH UP
(HERE)



TO OPEN



Nutrition Facts

Serving Size 1 cup (240mL)
Servings Per Container 8

Amount Per Serving
Calories 150

Total Fat 8g

Saturated Fat 5g

Trans Fat 0g

Cholesterol 35mg

Sodium 115mg

Total Carbohydrate 11g

Dietary Fiber 0g

Sugars 11g

Protein 8g

Vitamin A 6% • Vitamin C 4%

Iron 0% • Vitamin D 25%

* Percent Daily Values are based on a 2,000 calorie diet. Your values may be higher or lower depending on your calorie intake.

	Calories:	2,000
Total Fat	Less than	65g
Sat Fat	Less than	20g
Cholesterol	Less than	300mg
Sodium	Less than	2,400mg
Total Carbohydrate		300g
Dietary Fiber		25g
Protein		50g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: Milk, Vitamin D₃.

DISTRIBUTED BY
FLEMING COMPANIES, INC.
OKLAHOMA CITY, OK 73126 USA
©FLEMING COMPANIES, INC. 2000

KEEP RI

QUESTIONS OR COMMENTS
1-888-MY-BEST-1 (1-888-692-3781)
WEEKDAYS 8-5 (CENTRAL TIME)



PROCESSED AND
PACKAGED AT



Exhibit D

“Best Yet” Cereal
Distributed by Fleming
Companies, Inc.

Sugars	6g	
Other Carbohydrate	22g	
Protein	2g	
Vitamin A	25%	30%
Vitamin C	10%	10%
Calcium	0%	15%
Iron	50%	50%
Vitamin D	10%	25%
Thiamin	25%	25%
Riboflavin	25%	35%
Niacin	25%	25%
Vitamin B ₅	25%	25%
Folate	25%	25%
Vitamin B ₁₂	25%	30%
Phosphorus	4%	15%
Magnesium	4%	8%
Zinc	4%	6%
Copper	2%	2%

*Amount in cereal. One half cup skim milk contributes an additional 40 calories, less than 5mg cholesterol, 55mg sodium, 6g total carbohydrate (6g sugars), and 4g protein.

**Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: Corn, Refined Oats, Sugar, Rice, Brown Sugar, Whole Wheat, Corn Syrup, Wheat Bran, Salt, Partially Hydrogenated Vegetable Oil (Contains One or More of the Following Oils: Sunflower, Soybean, Coconut, Cottonseed), Honey, High Fructose Corn Syrup, Malt Syrup, Cinnamon, Natural & Artificial Flavors and BHT (a Preservative).

VITAMINS AND MINERALS: Vitamin C, Reduced Iron, Nicotinamide, Pyridoxine Hydrochloride (Vitamin B₆), Riboflavin (Vitamin B₂), Zinc Oxide (Source of Zinc), Thiamin Mononitrate (Vitamin B₁), Vitamin A Palmitate, Folic Acid, Vitamin B₁₂ and Vitamin D.
CONTAINS WHEAT AND BRAZIL NUT INGREDIENTS.

DISTRIBUTED BY FLEMING COMPANIES, INC.
OKLAHOMA CITY, OK 73126 USA
©FLEMING COMPANIES, INC. 2001

Simply put,
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Carbohydrates are classifi

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What's left is either stor

liver or recor

Carbohydrates are your

fueling their bod

It's a rash way to

*You can find more
in this
side panel



STAY



Exhibit E

“Best Yet” Trademark
Number 2746075
Currently Held By
Fleming Companies, Inc.

Latest Status Info

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2005-10-16 03:04:09 ET

Serial Number: 76300427

Registration Number: 2746075

Mark



(words only): BEST YET

Standard Character claim: No

Current Status: Registered.

Date of Status: 2003-08-05

Filing Date: 2001-08-16

Transformed into a National Application: No

Registration Date: 2003-08-05

Register: Principal

Law Office Assigned: LAW OFFICE 106

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2003-08-12

Latest Status Info

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Fleming Companies, Inc.

Address:

Fleming Companies, Inc.
5701 North Shartel
Oklahoma City, OK 73118
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Oklahoma

GOODS AND/OR SERVICES

International Class: 001

UNEXPOSED CAMERA FILM

First Use Date: 2002-03-01

First Use in Commerce Date: 2002-03-01

Basis: 1(a)

International Class: 003

NON-MEDICATED LIP BALM; NON-MEDICATED DOUCHES; PETROLEUM JELLY FOR COSMETIC PURPOSES; ALL PURPOSE COTTON SWABS FOR PERSONAL USE; NON-MEDICATED DIAPER RASH OINTMENT; BABY POWDER; BABY POWDER CONTAINING CORN STARCH; BABY LOTION; BABY OIL; BABY SHAMPOO; BABY WASH; BABY WIPES; HAIR SHAMPOO; HAIR CONDITIONERS; AFTER SHAVE LOTIONS; NON-MEDICATED DENTAL RINSE; NON-MEDICATED MOUTHWASH; DENTURE CLEANING PREPARATIONS; NAIL POLISH REMOVER; COTTON BALLS FOR COSMETIC PURPOSES; COSMETIC BALLS; COSMETIC PADS; SKIN LOTION; SKIN CREAM; HERBAL BODY WASH; BATH POWDER; FACIAL CREAMS AND LOTIONS; AFTER-SUN LOTIONS AND GELS; SUNBLOCK AND SUNSCREEN PREPARATIONS

First Use Date: 2002-03-01

First Use in Commerce Date: 2002-03-01

Basis: 1(a)

International Class: 005

ANTIBACTERIAL ALCOHOL SKIN SANITIZER GEL; ANTISEPTIC SKIN CLEANSER; COUGH, COLD AND FLU PREPARATIONS; PAIN RELIEF MEDICATIONS; PHARMACEUTICAL PREPARATIONS TO RELIEVE SINUS AILMENTS; PHARMACEUTICAL PREPARATIONS FOR THE RELIEF OF THROAT SORENESS AND MOUTH SORENESS; COUGH DROPS; VITAMIN DROPS; HOMEOPATHIC COMMON COLD ZINC PREPARATION WHICH REDUCES THE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;)	Civ. No. CV03 00385 SOM-LEK
)	(Copyright)
Plaintiff,)	
)	CERTIFICATE OF SERVICE
vs.)	
)	
HAWAIIAN EXPRESS SERVICE,)	
INC., a California corporation; et al.,)	
)	
Defendants.)	
_____)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document were duly served on the following parties via hand delivery and/or first class mail, postage prepaid, addressed as follow on OCT 26 2005 :

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C&S Acquisitions, LLC, ES3, LLC
and RICHARD COHEN

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Jacqueline Rio, and Justin Fukumoto

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and MICHAEL GURZI

Hand Delivered

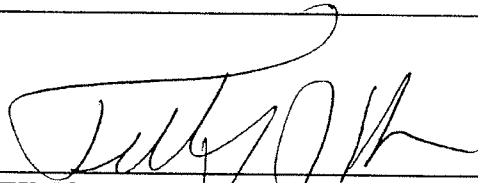
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Attorney for Defendant
Hawaii Transfer Company, Limited

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First Hawaiian Center
999 Bishop Street, 23rd Floor
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Attorneys for Defendant
ALIX PARTNERS, LLC

Hand Delivered

Dated: Honolulu, Hawaii, OCT 26 2005.


TIMOTHY J. HOGAN
Attorney for Plaintiff
Wayne Berry